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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 37

RIN 1601-AA97

Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes

AGENCY: Office of the Secretary, DHS.

ACTION: Final rule.

SUMMARY: This rule delays the date for card-based enforcement of the REAL ID regulations from October 1, 2020 until October 1, 2021. Beginning on that date, federal agencies may not accept a state-issued driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID compliant driver's license or identification card issued by a state that DHS has determined is in full compliance as defined under this part. The regulations also permit federal agencies to accept for official purposes until September 30, 2020, certain non-compliant driver's licenses and identification cards. This rule extends that date, authorizing federal agencies to continue to accept non-compliant driver's licenses and identification cards until the new card-based enforcement deadline.

DATES: Effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Steve Yonkers, Director, Biometrics and Credentialing/REAL ID Program; telephone (202) 447-3274; email [steve.yonkers@hq.dhs.gov](mailto:steve.yonkers@hq.dhs.gov).

SUPPLEMENTARY INFORMATION:

I. Background

A. The REAL ID Act, Implementing Regulations, and Phased Enforcement

The REAL ID Act (the Act) sets minimum security requirements for the issuance and production of driver's licenses and identification cards issued by the states, territories, and the District of Columbia in order for federal agencies to accept these documents for official purposes.<sup>1</sup> Official purposes include: (1) accessing federal facilities, (2) boarding federally regulated commercial aircraft, (3) entering nuclear power plants, and (4) any other purposes that the Secretary of Homeland Security shall determine.<sup>2</sup>

On January 29, 2008, DHS published a final rule implementing the Act's requirements.<sup>3</sup> The regulation includes both a deadline for state compliance with the REAL ID requirements and a deadline by which individuals must obtain a REAL ID compliant license or identification card in order to use that document for official purposes.<sup>4</sup> DHS refers to these deadlines as "state-based" and "card-based" enforcement, respectively.

For state-based enforcement, the Act and regulation prohibits federal agencies from accepting licenses and cards issued by states that are not compliant with the REAL ID standards as determined by DHS. On March 7, 2011, DHS changed the state-based enforcement deadline from May 11, 2011 to January 15, 2013.<sup>5</sup>

DHS then incrementally enforced this deadline through a phased-enforcement schedule, pursuant to which enforcement began at DHS headquarters, followed by enforcement at federal facilities and nuclear power plants.<sup>6</sup> On January 8, 2016, DHS announced that the final phase of the

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<sup>1</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, Div. B, title II, sections 201 to 207, May 11, 2005, as amended (codified at 49 U.S.C. § 30301 note).

<sup>2</sup> *Id.*

<sup>3</sup> See 73 FR 5272 (Jan. 29, 2008) (codified as amended at 6 CFR Part 37).

<sup>4</sup> 6 CFR 37.51(a) and 37.5.

<sup>5</sup> 76 FR 12269 (Mar. 7, 2011) (codified as amended at 6 CFR 37.51(a)).

<sup>6</sup> Cf. 6 CFR 37.51(a); DHS Releases Phased Enforcement Schedule for REAL ID (Dec. 20, 2013), *available at* <https://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id>.

enforcement schedule, applicable to individuals boarding federally-regulated commercial aircraft, would begin on January 22, 2018.<sup>7</sup> Thus, since January 22, 2018, the Transportation Security Administration (TSA) has accepted driver's licenses and identification cards only if issued by compliant states (or states with an extension from DHS) at screening checkpoints. In practice, TSA currently accepts driver's licenses and identification cards from all states and territories, as all are compliant or have an extension from DHS.

Under existing regulations, card-based enforcement is scheduled to begin on October 1, 2020.<sup>8</sup> Beginning on the card-based enforcement date, federal agencies are prohibited from accepting for official purposes a license or identification card issued by a state unless the license or card itself was issued in accordance with the REAL ID standards by a REAL ID compliant jurisdiction.

In addition to compliant licenses and identification cards, states may issue, to individuals who are unable or unwilling to present the documents and information necessary to obtain a REAL ID compliant license, licenses and cards that are not acceptable by federal agencies for official purposes. These non-compliant licenses and cards must (1) clearly state that the card is not acceptable for official purposes, and (2) have a unique design or color indicator that clearly distinguishes them from compliant licenses and identification cards.<sup>9</sup> The REAL ID regulations

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<sup>7</sup> See Statement By Secretary Jeh C. Johnson on the Final Phase of REAL ID Act Implementation (Jan. 8, 2016), available at <https://www.dhs.gov/news/2016/01/08/statement-secretary-jeh-c-johnson-final-phase-real-id-act-implementation>.

<sup>8</sup> 6 CFR 37.5(b).

<sup>9</sup> 6 CFR 37.71; REAL ID Act § 202(d)(11).

authorize, but do not require, federal agencies to accept these non-compliant cards up until the October 1, 2020, card-based enforcement deadline.<sup>10</sup>

## B. Progress Towards Full Implementation

Since its enactment in 2005, DHS has worked with the states to implement the requirements of the REAL ID Act. DHS has provided funding, technical assistance, outreach, and engagement. DHS has awarded over \$263 million in grant funding to assist in enhancements to driver's license security programs.<sup>11</sup> DHS and the states have collectively built the technical infrastructure to support systems to verify identity and lawful status information, which is a key security component of the Act and regulation. DHS, the states, and other stakeholders have conducted broad outreach and engagement to inform the public of REAL ID requirements and upcoming enforcement deadlines. These efforts have yielded significant progress towards full REAL ID implementation. Fifty-two of the 56 jurisdictions subject to REAL ID have achieved compliance with the REAL ID standards and are currently issuing REAL ID-compliant licenses and identification cards.<sup>12</sup> Together, compliant states, territories and the District of Columbia have issued more than 100 million compliant licenses and cards, which represent approximately 36 percent of the population eligible for these documents.<sup>13</sup> Data from the states also indicates that states have issued approximately 72 million non-compliant marked licenses and identification cards. Together, this data suggests approximately two-thirds of the population

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<sup>10</sup> See 84 FR 55017 (Oct. 15, 2019) (clarifying that the October 1, 2020 deadline by which Federal agencies may no longer accept non-compliant driver's licenses and identification cards for official purposes applies to all non-compliant cards, including state-issued driver's licenses and identification cards marked to indicate that they may not be used for official Federal purposes).

<sup>11</sup> Secure Identification State Progress Report-Fiscal Year 2012 Report to Congress.

<sup>12</sup> New Jersey and the Commonwealth of the Northern Mariana Islands are pending DHS compliance determinations. American Samoa, Oklahoma, and Oregon have not submitted requests for compliance determination.

<sup>13</sup> Based on February 2020 REAL ID issuance data voluntarily submitted monthly to DHS by the compliant states.

does not currently possess a REAL ID-compliant license or identification card that such individuals may need for official purposes, including to use as identification at TSA airport security checkpoints to board federally regulated commercial aircraft.<sup>14</sup>

DHS has increased its level of outreach and engagement to the public and other REAL ID stakeholders, including airlines, airports, and others in the travel industry. Through these engagements, DHS has received useful feedback regarding the challenges of fully implementing REAL ID ahead of the October 1, 2020, card-based enforcement deadline.

DHS has been working with the states and other stakeholders to identify ways to modernize the REAL ID application process. To further enlist stakeholder input on ways to streamline the driver's license application process without compromising the security aspects of the REAL ID process, DHS issued a request for information (RFI) on November 7, 2019.<sup>15</sup> The RFI requested input from the public, states, private sector entities and other interested stakeholders on ways to improve, streamline, and reduce burdens associated with the current application process through the use of new capabilities and technologies in addition to other modification to existing application requirements. The RFI, for which the comment period closed on December 9, 2019, yielded more than 100 proposals from the states, the public, the private sector, and stakeholder associations among others. DHS quickly assessed these proposals and immediately determined that a proposal involving electronic submission of identity source documents prior to an in-person Department of Motor Vehicles (DMV) visit could be achieved consistent with existing authorities. DHS issued guidance to states recommending they consider using this process to

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<sup>14</sup> Although a significant segment of the population may not currently possess a REAL ID, they may have other forms of identification acceptable for official purposes (e.g., a U.S. passport, U.S. passport card, or military identification).

<sup>15</sup> 84 FR 60104 (Nov. 7, 2019).

streamline the application process and reduce customer wait times.<sup>16</sup> DHS continues to review the proposals and is looking for additional ways to streamline the application and issuance process consistent with the security aspects of the REAL ID Act.

### C. Coronavirus Disease 2019 (COVID-19)

Coronavirus Disease 2019 (COVID-19), a communicable disease caused by a new (novel) coronavirus named SARS-CoV-2, is a respiratory disease that can cause fever, cough, and difficulty breathing, with reported illnesses ranging from mildly symptomatic to severe illness and death. Although the virus that causes COVID-19 was originally detected in The People's Republic of China, as of mid-March 2020, it had resulted in a pandemic with cases in over 150 countries, including in the United States and Canada. On January 30, 2020, the Director-General of the World Health Organization declared the outbreak a “public health emergency of international concern” under the International Health Regulations (2005).<sup>17</sup> On January 31, 2020, the Secretary of the Department of Health and Human Services declared a nationwide “public health emergency” under section 319 of the Public Health Service Act, 42 U.S.C. 274d, as a result of confirmed cases of COVID-19.<sup>18</sup> On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak can be characterized as a pandemic. On March 13, 2020, the President determined that the ongoing COVID-19 pandemic is of sufficient severity and magnitude to warrant an emergency determination under section 501(b) of the

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<sup>16</sup> See DHS, REAL ID Act of 2005 Implementation: Acceptance of Electronically Submitted Copies of Source Documents with Certain Restrictions in Advance of an In-Person DMV Visit (Feb. 19, 2020), *available at* <https://www.dhs.gov/publication/acceptance-electronically-submitted-copies-source-documents?collection=headquarters-guidance-documents>.

<sup>17</sup> Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (Jan. 30, 2020), *available at* [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

<sup>18</sup> HHS, “Determination that a Public Health Emergency Exists,” <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207. In addition, on March 13, 2020, the President declared a national emergency under sections 201 and 301 of the National Emergencies Act, 50 U.S.C. 1601 et seq.<sup>19</sup> State and local jurisdictions throughout the United States are engaged in various social distancing practices, which frequently entail closing non-essential business and government services and avoiding crowds. On March 17, 2020 the National Governors Association (NGA) sent DHS a letter requesting an extension of the REAL ID enforcement deadline by at least a year due in part to many states closing DMVs and other state facilities as a result of the COVID-19 public health crisis.<sup>20</sup>

## II. Card-based enforcement deadline

Notwithstanding the significant progress made towards full REAL ID implementation, the Secretary recognizes significant challenges associated with full enforcement in the current environment. The outbreak and continued spread of COVID-19 has significantly disrupted the daily lives and activities of all Americans. It has shifted priorities and severely curtailed daily interactions. To limit exposure and reduce the chance of transmission, state and local government offices have restricted all but the most essential services. This includes activities at state DMVs where offices are either operating at limited capacity, providing remote services, or, in some cases, are temporarily closed to the public.<sup>21</sup> Additionally, some states have authorized grace periods and extensions to those with expiring licenses as a further way to avoid in-person contact and mitigate risks to the health and safety of the public and state government employees.

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<sup>19</sup> Proclamation 9994 of Mar. 13, 2020 on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

<sup>20</sup> National Governors Association letter to Acting Secretary Wolf (Mar. 17, 2020).

<sup>21</sup> Individuals should check with their state DMV for policies and guidance on license issuance and renewals and other services during the disruption caused by COVID-19.

DHS recognizes the impact these disruptions will have on the ability of an individual to obtain a REAL ID compliant license or identification card before October 1, 2020. Moreover, the Secretary recognizes the importance of social distancing, and is taking this action to assure the public that there is no need to visit a DMV to obtain a REAL ID document at this time.

Accordingly, the Secretary is extending the date by which individuals must obtain a REAL ID license or identification card to use that document for official purposes until October 1, 2021.

Additionally, to avoid any confusion about the ability of federal agencies to continue to accept certain non-compliant licenses and identification cards issued under § 37.71, DHS also is extending the date by which federal agencies may continue to accept these licenses and identification cards for official purposes until September 30, 2021. Although some agencies, including TSA, accept these licenses and identification cards for official purposes, others may decide not to accept, or currently do not accept, non-compliant marked cards for official purposes. Individuals who need to visit a federal facility, building, or office should check in advance whether the agency requires identification for access purposes and, if they do, the forms of identification they accept.

### III. Regulatory Analysis

#### A. Administrative Procedure Act

DHS takes this action without prior notice and public comment.

Sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. 553) authorize agencies to dispense with certain rulemaking procedures when they find good cause to do so. Under section 553(b), the requirements of notice and opportunity to comment do not apply when the agency for good cause finds that these procedures are “impracticable, unnecessary, or contrary to

the public interest.” Section 553(d) allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30-day delayed effective date requirement in section 553.

This final rule recognizes the need to extend the card-based enforcement deadline in light of the significant disruption and uncertainty in government operations caused by the COVID-19 virus, as well as the need to encourage appropriate social distancing behavior. Delaying the change to the regulation’s enforcement date by first undergoing notice and comment would be contrary to the public interest, as an expeditious regulatory announcement of the new deadline is necessary for state and individual planning purposes. These factors suggest that delays associated with notice and comment rulemaking would potentially undermine critical public health efforts at the federal, state, territorial, or local level. DHS therefore has good cause to bypass such procedures.

#### B. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### C. Executive Orders 12866 and 13563 Assessment

This rule constitutes a “significant regulatory action” under Executive Order 12866, as supplemented by Executive Order 13563, and therefore has been reviewed by the Office of Management and Budget (OMB). Executive Order 12866 defines “significant regulatory action” as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an

action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. DHS is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the urgent needs described above.

#### D. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal agencies to consider the potential impact of regulations on small businesses, small government jurisdictions, and small organizations during the development of their rules. This final rule, however, makes changes for which notice and comment are not necessary. Accordingly, DHS is not required to prepare a regulatory flexibility analysis. See 5 U.S.C. 603, 604.

#### E. Executive Order 13132 (Federalism)

A rule has federalism implications under Executive Order 13132, "Federalism," if it has a substantial direct effect on state governments, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. DHS has analyzed this rule under that Order and has determined that although this rule affects the states, it does not impose substantial direct compliance costs or preempt state law. In fact, the rule is responsive to concerns expressed by state agencies regarding the upcoming deadlines. DHS has determined that the rule is consistent with Executive Order 13132.

#### F. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Unfunded Mandates Reform Act addresses actions that may result in the expenditure by a state, local, or Tribal government, in the aggregate, or by the private sector of \$100 million (adjusted for inflation) or more in any one year. This final rule will not result in such an expenditure.

#### G. Executive Order 13175 (Tribal Consultation)

This rule does not have Tribal Implications under Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

#### H. Environment

DHS reviews proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023-01 Rev. 01 (Directive) and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. For an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)-(c).

The delay effectuated by this rule fits within categorical exclusion A3(a) “Promulgation of rules ... of a strictly administrative or procedural nature.” Instruction Manual, Appendix A, Table 1. Furthermore, the rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental impacts. Therefore, the rule is categorically excluded from further NEPA review.

#### I. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel, for purposes of publication in the *Federal Register*.

#### **List of Subjects in 6 CFR Part 37**

Document security, Driver’s licenses, Identification cards, Motor vehicle administrations, Physical security.

For the reasons set forth above, the Department of Homeland Security amends 6 CFR part 37 as follows:

#### PART 37 – REAL ID DRIVER’S LICENSES AND IDENTIFICATION CARDS

1. The authority citation for part 37 continues to read as follows:

Authority: 49 U.S.C. 30301 note; 6 U.S.C. 111, 112.

##### Subpart A—General

2. In § 37.5, revise paragraphs (b) and (c) to read as follows:

#### **§ 37.5 Validity periods and deadlines for REAL ID driver's licenses and identification cards.**

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(b) On or after **October 1, 2021**, Federal agencies shall not accept a driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID–compliant driver's license or identification card issued by a State that has been determined by DHS to be in full compliance as defined under this subpart.

(c) Until **September 30, 2021**, Federal agencies may accept for official purposes a driver's license or identification card issued under § 37.71. On or after **October 1, 2021**, Federal agencies shall not accept for official purposes a driver's license or identification card issued under § 37.71.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel,

U.S. Department of Homeland Security.

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